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Thirty-third session

SUMMARY RECORD OF THE 694th MEETING

Held at Headquarters, New York,
on Friday, 23 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/470, A/CN.9/XXXIII/CRP.2 and Add.1, CRP.8)

1. Ms. SABO (Observer for Canada) said she would prefer to delete article 4 (2) of the text contained in document A/CN.9/470, as the Commission could not be certain that States would only resort to it in very limited circumstances. Article 4 (2) could create disharmony to an extent that would outweigh the benefit of bringing in more States.

2. Mr. ATWOOD (Australia) said he agreed that article 4 (2) should be deleted, as it would increase the complexity of application of the Convention.

3. Mr. RENGER (Germany) noted that in view of the list of exclusions, the loophole of article 4 (2) was unnecessary. It would endanger the aim of achieving uniform law.

4. Mr. TELL (France) said he had previously shared Germany's views with regard to article 4 (2) because he had believed that the content of certain other provisions was already fixed. However, the Commission's discussions were resulting in changes to some of those articles, and he could not be certain of the content of the debtor protection - or consumer protection - provisions, which might not even be discussed at the current session. The Commission was trying to discuss a final clause before knowing the full contents of the Convention. His delegation might later find it necessary to refer to a particular type of debtor under article 39; he therefore suggested that the Commission should defer the debate on article 4 (2).

5. Mr. BURMAN (United States of America) said he agreed with the views expressed by the French delegation. Article 39 might yet be a critical safety valve for a number of countries. In order to ensure broad support for the draft Convention, there had to be the possibility of excluding certain highly organized industries that did not wish to be covered by its rules.

6. It was premature to discuss what was in effect a final provision that could be discussed only when the rest of the draft Convention had been agreed on.

7. Mr. FERRARI (Italy) said that the Commission should wait at least until the discussion of the debtor protection rules, which were referred to in both articles 4 (2) and 39.

8. The CHAIRMAN said he took it that the Commission would defer its discussion of article 4 (2) until it undertook its consideration of article 39.

9. Mr. COHEN (United States of America) said that, according to the Commission's preliminary report, the issue of dematerialized securities holdings, and even repurchase agreements, might still need to be addressed in the context of exclusions. On the previous day the Commission had heard from Mr. Potok the International Bar Association's strong recommendation that the draft Convention should not cover assignments of receivables in investment

securities. The existing exclusions did apply to part of that area, but they did not address the key issue of the holding of investment securities through intermediaries.

10. Mr. RENGER (Germany) agreed that the issue should be addressed.

11. Mr. COHEN (United States of America) proposed that the exclusion relating to assignments of receivables arising from the sale or loan of investment securities should be expanded to read: "This Convention does not apply to assignments of receivables arising from the sale, loan, agreement to repurchase, or direct or indirect holding of investment securities, whether or not dematerialized."

12. Mr. DESCHAMPS (Observer for Canada) agreed that the draft Convention should not apply to assignments of receivables arising from investment securities. However, the text should not be complicated unnecessarily. Article 4 (2) (f) of document A/CN.9/XXXIII/CRP.2 already excluded assignments of receivables arising under or from "The sale or loan of, or agreement to repurchase, investment securities". He considered that language to be sufficient to cover securities. In addition, the draft Convention applied only to assignments of receivables, and a receivable was defined as a right to payment of a sum of money. The right to obtain delivery of receivables was not a receivable.

13. Mr. DOYLE (Observer for Ireland) agreed with the previous speaker. He had no objection to the United States proposal, but did not see how it was different to the proposal contained in document A/CN.9/XXXIII/CRP.2. If it was not a policy issue, the Commission could accept the wording already offered by the drafting group.

14. Ms. GAVRILESCU (Romania) said she did not oppose the United States proposal but felt that the previous speakers would need to reach agreement on the wording.

15. Mr. SMITH (United States of America) said that the existing language did not cover his delegation's concerns, as it did not refer to the mere holding of securities, especially their holding in an investment account or securities account.

16. If his previous proposal had been too ambitious, the addition of the words "holding of investment securities" to sub-paragraph (f) would be acceptable.

17. The CHAIRMAN noted that the Canadian delegation's point had not been addressed. The "holding" of securities would not seem to generate any rights to payment, with the possible exception of fees earned by the intermediary.

18. Mr. SMITH (United States of America) said that there were many situations where the holding of securities and other financial assets in a securities account resulted in a receivable owed to the customer of that account. Cash balances in securities accounts were not unlike deposit account cash balances, which were already excluded from the Convention. A broker could be obligated, when holding investment securities, to pay dividends received directly to the customer, or he could be obligated to sell securities which then created a

receivable owed to the broker. The money then paid by the broker to the customer might also be a receivable. Rather than debating whether all of those rights to payment were receivables covered by the Convention, they could all be excluded by language specific enough to resolve any ambiguity.

19. Mr. STOUFFLET (France) said there was another unresolved substantive issue. The drafting group had had difficulty in interpreting a provision of the United States proposal relating to the scope of articles 11 and 12, which read in part as follows: "This article applies only to receivables: (a) Arising under an original contract for the sale or lease of goods". It was not clear what was meant by the word "goods", and whether sub-paragraph (a) in document A/CN.9/XXXIII/CRP.8 should also include a reference to receivables arising from the sale or lease of real estate.

20. Mr. DUCAROIR (Observer for the European Banking Federation) said he welcomed the United States proposal, which filled a gap in the Federation's proposal. It was not a question of transactions involving the sale or lease of real estate securities, which were dealt with by professionals in the financial market, but of the holding of real estate securities by individuals or institutional investors. The United States proposal was indispensable, because the person who placed real estate securities in a bank or in another financial intermediary had a receivable that required compensation. The dematerialization of real estate securities meant that they could be placed in an account, as opposed to being held in a tangible form. If the intermediary was in default, compensation in cash would have to be provided.

21. Mr. DESCHAMPS (Observer for Canada) said that his previous statement had been motivated by a concern to establish a text that would be accessible to outsiders, and therefore not unnecessarily complicated. The United States delegation had convinced him that it was appropriate to ensure that monetary receivables that might arise from holding an account with a broker or some other financial intermediary should be referred to.

22. Mr. MORÁN BOVIO (Spain) said he supported the proposed amendment for the reasons expressed by the previous speakers. He also expressed a reservation with regard to the list of exclusions. All members of the Commission should urgently consider the practices included in the list and determine whether they were the ones intended to be included, and whether they had sufficient coverage. Particular care should be taken to ensure coverage of all of the transactions that the Commission wished to exclude from the draft Convention. The Commission's methods of work needed to be clarified, for it was very difficult to deal with a text that was agreed on at one moment and was then almost immediately amended.

23. Mr. MARADIAGA (Honduras) said that his delegation agreed with the delegation of Spain. Since article 4 (2) referred to article 39, in which there were exclusions, it could not be considered in isolation without full knowledge of what would be excluded from the draft Convention; that would negate the objective of achieving legislative harmonization and unification.

24. Mr. RENGER (Germany) said that his delegation supported the United States proposal. It was obvious that the payment of interest or dividends generated by

investment securities was a receivable, which arose through the direct or indirect holding of investment securities. The addition should therefore be made in order to have a complete understanding of what was excluded. There was no need for the words "whether or not dematerialized" because that was a technical aspect of securities trading.

25. Mr. TELL (France) said his delegation felt that it would be reasonable to exclude assignments of receivables arising from the holding of investment securities, if receivables arising from the sale or loan of investment securities were to be excluded. It was not necessary to specify whether the holding was direct or indirect, or whether or not the securities were dematerialized.

26. The CHAIRMAN said that the representative of France had summarized the direction in which the Commission seemed to be moving; the matter should be referred back to the drafting group. The representatives of Spain and Honduras had made the significant point that there must be clarity about exactly what was included in the draft Convention, and what was excluded. No surprises should be sprung after so many years of work.

27. Mr. TELL (France), referring to the Unites States proposal (A/CN.9/XXXIII/CRP.8), said that it was not clear whether the English word "goods" covered immovables.

28. Mr. MORÁN BOVIO (Spain) said that in Spanish, the word "bienes" could refer to movable or immovable goods.

29. The CHAIRMAN recalled that the Commission had conducted extensive deliberations on the question of excluding assignments of receivables arising from real estate transactions.

30. Mr. TELL (France) said that the word "biens" in French covered both movable and immovable goods. The problem was that the English word "goods" seemed to have a nuance which did not exist in other languages, and the Commission needed to know whether it covered immovable goods.

31. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Commission had considered an exception for rights arising from the sale or lease of real estate, and had decided that real estate should not be excluded. The question of whether the term "goods" included buildings had been raised in the drafting group but had been referred back to the Commission.

32. Ms. GAVRILESCU (Romania) said that her delegation fully agreed with the representative of France; in Romanian law, there was a clear distinction between movable and immovable goods. The English and French texts needed to be aligned.

33. Mr. FERRARI (Italy) said that the Commission should refer to other texts in which it had used the term "goods" and model the draft Convention on those texts.

34. Ms. McMILLAN (United Kingdom) said that land generally included buildings, but there was a distinction between goods and land, depending on the context.

35. Mr. DOYLE (Observer for Ireland) said his delegation agreed that the meaning of the term "goods" depended on the context. Goods would not include real estate, but real estate would include buildings. If there was any risk of ambiguity, the term "goods" could be defined in the text of the draft Convention.

36. Mr. SMITH (United States of America) said that it was his delegation's understanding that the Commission was talking not about buildings, but about goods in the narrow sense of personal property, rather than real property.

37. Ms. WALSH (Observer for Canada) said that her delegation believed that "goods" meant tangible movables or tangible personal property, and excluded real estate, including buildings.

38. Mr. STOUFFLET (France) said that there were two issues: whether receivables arising from real estate transactions were covered by the draft Convention, and how those receivables would be treated under articles 11 and 12.

39. The CHAIRMAN said that those issues had been debated at length; apparently the language was still not satisfactory.

40. Mr. SALINGER (Observer for Factors Chain International) said he felt that the issue of whether "goods" constituted real estate depended on the situation. For example, bricks being delivered to a building site were goods, but once they had been put in place and mortared, they were real estate.

41. Mr. MORÁN BOVIO (Spain) said he believed that, as agreed in the previous week, the draft Convention covered all real estate transactions, except in cases where national law excluded such transactions. There was no reason to exclude real estate operations in articles 11 and 12; the interpretation of the word "goods" in articles 11 and 12 should therefore include immovables.

42. Mr. DOYLE (Observer for Ireland) urged the Commission not to reopen the debate on article 11, since it had accepted the text contained in document A/CN.9/XXXIII/CRP.8. The Commission had agreed to the text; all it needed to do now was to fine-tune the language.

43. Ms. WALSH (Observer for Canada) said that her delegation believed that "goods" meant tangible personal property and did not include personal property at large. She did not think that an assignment of a receivable relating to the lease of land was included under article 11 3(a).

44. Mr. TELL (France) said that his delegation had always believed that the draft Convention applied to receivables arising from real estate operations. If the draft Convention did not cover real estate operations, there would be very little left.

45. The CHAIRMAN said that the issue was clear: one group of delegations believed that "goods" included real estate and would fall within the scope of

the draft Convention; and the other group believed that "goods" did not include real estate and that real estate did not fall within the scope of the draft Convention.

46. Mr. COHEN (United States of America) said that his delegation was concerned that a question of translation could reopen a number of major policy decisions already made by the Commission. The issue of the scope of the draft Convention had been considered and resolved; it did not arise in article 11, but was dealt with elsewhere. It was his delegation's understanding that article 11 (3) applied to receivables arising from original contracts for the supply or lease of goods, but not for the lease of buildings.

47. Mr. TELL (France) said that the problem was that while the scope of application of the draft Convention as a whole was not defined in an inclusive manner, the United States proposal for article 11 (3) had the effect of defining positively the scope of application of articles 11 and 12, which could disrupt the system established so far. He saw no justification for excluding real estate transactions.

48. The CHAIRMAN recalled that the wording in document A/CN.9/XXXIII/CRP.8 had been designed to meet concerns about national laws governing land and receivables arising from the sale of land.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

49. The CHAIRMAN invited the Commission to resume its debate on whether receivables arising from an interest in real estate should be among the exclusions listed in article 11.

50. Mr. DOYLE (Observer for Ireland) said that first of all the Commission should settle its definition of "goods". He commended the suggestion by the representative of Italy that the word should be used as it was understood in international business practice and in other UNCITRAL conventions, particularly the United Nations Convention on Contracts for the International Sale of Goods, which had been ratified by 54 States, including France. No ambiguity had arisen over the use of the word "goods" in that document. It was, however, open to the Commission to provide a definition of the term.

51. Mr. HERRMANN (Secretary of the Commission) said that the difficulty of working in the six official languages of the United Nations was sometimes underestimated. A term natural to one language might carry a different implication in another. In the French version of document A/CN.9/XXXIII/CRP.8, the equivalent of the word "goods" was "biens", which included real estate and buildings. He could not deny that in the past delegations had on occasion used such language differences to reopen issues that had been settled; but that was all the more reason to welcome any attempt at clarification, even if it lengthened the proceedings. Ultimately, however, the Commission should decide its view on an issue and then find the appropriate way to express its policy.

52. Mr. TELL (France), after acknowledging the wisdom of the Secretary's comments, proposed an amendment in English, prepared with the help of the Canadian delegation, to the United States proposal contained in document

A/CN.9/XXXIII/CRP.8. Subparagraph (a) should read: "Arising under an original contract for the supply or lease of goods or sale, lease or mortgage of real estate or the provision of services other than financial services."

53. Ms. WALSH (Observer for Canada) said that, owing to the confusion of the definition of "goods", the Commission had as yet reached no decision on the application of articles 11 and 12 to contracts relating to receivables arising out of immovable goods. Her delegation supported the expansion of the scope of the articles, as reflected in the French amendment, unless good reason was given why anti-assignment clauses should not be subject to the general rule under article 11.

54. Mr. COHEN (United States of America) said that his delegation was reluctant to lend its full support to the amendment proposed by the representative of France until it had had an opportunity to carry out consultations about its potential effect on the financing industry. Article 11 was a key provision of the draft Convention, on which consensus had been achieved only after much discussion. It had been recognized that the article need not apply to all assignments of all receivables because of the need not to upset well-established financing practices, in the field of real estate, among others. The proposed amendment undoubtedly gave article 11 a broader scope than his delegation had envisaged. He noted that the article did not mandate that anti-assignment clauses should be enforced. Domestic law could, therefore, override such a clause.

55. Mr. DOYLE (Observer for Ireland) said that the adoption of the proposed amendment would cause great difficulties for his delegation. The financing industry in Ireland was unwilling that real estate in any form should be covered by the draft Convention. His delegation had reluctantly agreed to the additional provision under article 4, but he had understood, on the basis of document A/CN.9/XXXIII/CRP.8, that article 11 would apply only to certain transactions relating to goods, not to real estate.

56. Mr. FRANKEN (Germany) expressed support for the proposed amendment. He saw no reason why receivables arising out of contracts relating to real estate should be excluded. Established practices need not be affected. Indeed, anti-assignment clauses were hardly ever encountered in contracts relating to real estate, in any case.

57. Ms. GAVRILESCU (Romania) expressed concern that the new provision created by the addition of the proposed amendment might cause confusion. There was no similar provision elsewhere in the draft Convention and she feared that the new provision which the Commission had recently adopted under article 4 might thereby be subject to a different interpretation from that intended. She was therefore in favour of leaving article 11 as it stood, particularly since the draft convention would, in principle, apply to all property except in those cases where it was overridden by domestic legislation.

58. Mr. TELL (France) said that there were no grounds for fearing that his proposed amendment would affect the exception contained in article 4. The amendment should, however, be passed on to the drafting group; he himself was not prepared to provide more than a rough translation of the English version.

59. Ms. McMILLAN (United Kingdom) said that the need to redraft provisions that had supposedly been finalized was an inevitable consequence of the Commission's decision to postpone consideration of the scope of the draft Convention to a very late stage.

60. She was prepared to accept the French proposal on the understanding that the assignment of receivables arising from land did not interfere with the internal legislation of the State where the land was located except insofar as that legislation was modified by the draft Convention itself.

61. She had serious reservations regarding the proposed amendment to article 4 (A/CN.9/XXXIII/CRP.2/Add.1); paragraph 3 (a) was unclear and paragraph 3 (c) was not an accurate representation of the outcome of the Commission's deliberations.

62. The CHAIRMAN said that the Commission would have to consider the entire report of the drafting group at a later date with such concerns in mind.

63. Mr. MORÁN BOVIO (Spain) said that he was in favour of the French proposal, since it provided the clarity that national industries would require in order to evaluate the draft Convention.

64. Mr. WINSHIP (United States of America) suggested that the text of the proposal should be placed in brackets and a decision on the matter postponed pending further consultations.

65. The CHAIRMAN noted that the Commission was meeting as a whole in order to finalize the provisions of the draft Convention. While he would defer to the wishes of the group, he did not think that there was broad support for postponing further discussion of the proposal.

66. Mr. IKEDA (Japan) noted that the word "goods" was translated as "biens" in the French text of document A/CN.9/XXXIII/CRP.8 but as "marchandises" in document A/CN.9/XXXIII/CRP.2/Add.1 (art. 11 (3) (a)). He also wondered whether the word "hypothèques" in the French proposal corresponded exactly to the English "mortgages". Lastly, if the Commission adopted the French proposal, the same amendment should be made to article 12.

67. The CHAIRMAN said that the Commission should concentrate on taking a clear policy decision; the drafting group would find the appropriate wording.

68. Mr. DESCHAMPS (Observer for Canada) suggested that further discussion of the matter should be postponed until the afternoon meeting so that the representatives of France and Canada could hold discussions with other participants in the interim. He was concerned that the mention of initial mortgage contracts might lead to the perhaps-inadvertent inclusion of a syndicated loan guaranteed by a mortgage. The Commission had already decided to preserve the clauses in syndicated loan contracts that made assignment subject to the consent of the borrower or the lead bank.

69. The CHAIRMAN asked whether the Commission wished to place the French proposal in brackets or to continue its efforts to find language that reflected the group consensus.

70. Mr. TELL (France) pointed out that on the previous day his own delegation had accepted language which it had earlier opposed but which had been approved by the Commission as a whole; it had not sought to place that text in brackets or to postpone the matter to a later date, and it would be equally inappropriate to do so in the case at hand.

71. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt the French proposal subject to drafting changes and to further consultations on the advisability of including a reference to mortgages.

72. It was so decided.

73. The CHAIRMAN invited the Commission to resume consideration of the report of the drafting group (A/CN.9/XXXIII/CRP.2/Add.1).

74. Ms. McMILLAN (United Kingdom) said that the proposed amendment to article 4 (3) (a) was quite incomprehensible from the point of view of British law. She took that provision to mean that the Convention did not affect any question as to whether an interest in land conferred a right in a receivable arising from a transaction related to that land. The words "interest in land" had a technical meaning, one illustration of which would be a freehold. But the question of how the fact of having a freehold interest in land could confer such a right - for example, in the case of a mortgage, how a freeholder could possibly have a right in the mortgage payments that he was obliged to pay to the mortgagee - would simply never arise. She wondered whether she had failed to grasp some essential aspect of the issue.

75. The proposed amendment to article 4 (3) (c) was similarly unclear.

76. Mr. DOYLE (Observer for Ireland) said that while he realized that the drafting group's task was a difficult one, the proposed amendment, and particularly paragraph (3) (a) thereof, bore little resemblance to the United States proposal on which it was based.

77. Mr. SMITH (United States of America) said he realized that translation was a difficult task and that some States' national legislation might not cover the issue addressed in the proposal.

78. The problem that his delegation had endeavoured to address in paragraph (3) (a) was that of a loan secured by a mortgage on real estate. In some countries, if that real estate was leased by its owner, the lease receivable was considered part of the mortgage. Alternatively, crops grown on mortgaged land might give rise to a receivable which might be considered part of the mortgage under domestic law. The intent had been to ensure that such cases were determined according to the domestic law of the country in which the real estate was located.

79. The purpose of subparagraph (b) was to state that in cases such as those which he had described, conflicts of priority between the assignee of the receivable and the holder of the mortgage were not covered by the draft Convention.

80. The CHAIRMAN said that the wording of the proposal had apparently been an attempt to address an issue arising from the Commission's discussions. However, it was not for the drafting group to consider matters that had not actually been discussed by the Commission as a whole; such problems should be referred back to the Commission for further consultation.

ELECTION OF VICE-CHAIRMAN

81. Mr. CACHAPUZ de MEDEIROS (Brazil), speaking on behalf of the Latin American delegations, nominated Mr. Maradiaga (Honduras) for the office of Vice-Chairman.

82. Mr. Maradiaga (Honduras) was elected Vice-Chairman by acclamation.

The meeting rose at 1 p.m.